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SUPREME COURT OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE
CENTER FOR ENVIRONMENTAL LAW AND POLICY AND
SIERRA CLUB,

Appellants,

v.

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF
ECOLOGY, and EASTERDAY RANCHES, INC.,

Respondents,

and

WASHINGTON CATTLEMEN'S ASSOCIATION, COLUMBIA
SNAKE RIVER IRRIGATORS ASSOCIATION, WASHINGTON
STATE DAIRY FEDERATION, NORTHWEST DAIRY
ASSOCIATION, WASHINGTON CATTLE FEEDERS ASSOCIATION,
CATTLE PRODUCERS OF WASHINGTON, WASHINGTON STATE
SHEEP PRODUCERS and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

AGRICULTURAL ASSOCIATIONS' REPLY TO BRIEF OF
AMICUS CURIAE AQUA PERMANENTE

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ORIGINAL

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I. INTRODUCTION

Washington State Dairy Federation, Northwest Dairy Association, Washington Cattle Feeders Association, Cattle Producers Of Washington, Washington State Sheep Producers and Washington Farm Bureau (hereinafter "Agricultural Association Interveners"), submit this brief in response to the Brief of Amicus Curiae Aqua Permanente ("AP"). AP's Brief offers no insight which is helpful to the Court to resolve the specific issues before the court in this case. AP attempts to introduce new, unsubstantiated, and inaccurate facts which do nothing more than confuse groundwater management issues ongoing in Kittitas County. Like the improper new facts offered by AP, the "argument" offered by AP misses the mark and has no bearing on the issues before the Court.

II. DISCUSSION

2.1 The Court Should Disregard AP's Introduction of New Facts that are Outside the Record and Irrelevant.

AP offers significant factual background on what allegedly has occurred in the Upper Kittitas County basin with respect to the Department of Ecology's ("Ecology") withdrawal of all unappropriated groundwater pursuant to WAC Chapter 173-539A. AP Brief at 5-12.

The new facts that AP recites in its Brief are not relevant to the issue before the Court. The issue in this case is a focused question of statutory interpretation, specifically -- are permit-exempt withdrawals of

water for stock watering purposes under RCW 90.44.050 limited to a particular quantity of water?

AP attempts to introduce classifications adopted by the Federal Occupational Safety and Health Administration relating to cattle feeding operations. This new evidence is unsubstantiated and offered at the eleventh hour, without an opportunity to review all of the evidence referenced and determine its relevancy. AP's offer of this information, which is outside the record, is objectionable and should not be considered by the Court. In any event, this new evidence regarding a federal workplace safety agency is irrelevant and not helpful to interpreting a state water resources statute.

2.2 The Franklin County Superior Court's Interpretation of RCW 90.44.050 Will Have No Impact on the Department of Ecology's Implementation of the Kittitas County Groundwater Rule.

The affirmation by this Court of the Franklin County Superior Court's determination that exempt groundwater withdrawals for stock watering purposes are not limited by a specific quantity will not interfere with Ecology's management of groundwater in Upper Kittitas County.

AP argues that permit-exempt stockwater wells would interfere with the Watershed Based Management Plan adopted by the Department of Ecology and WAC Chapter 173-539A. AP's argument is incorrect. If

it demonstrates anything. AP's argument works against Appellants and illustrates a regulatory tool used to manage groundwater, including permit-exempt groundwater uses.

Ecology has by rule withdrawn all unappropriated water in upper Kittitas County. WAC Chapter 173-539A stopped all new withdrawals (except where water impacts are mitigated) of groundwater in Upper Kittitas County, including new withdrawals for stock watering purposes.

Beginning on the effective date of this rule, all public groundwaters within the upper Kittitas County are withdrawn from appropriation. No new appropriation or withdrawal of groundwater may occur, including those exempt from permitting, except:

- (a) Uses of groundwater for a structure for which a building permit is granted and the building permit application vested prior to July 16, 2009; and
- (b) Uses determined to be water budget neutral under WAC 173-539A-050.

WAC 173-539A-040(1) (emphasis added).¹ Existing stock water use is prohibited from expansion without mitigation. WAC 173-539A-050. Because the Watershed Based Management Plan adopted by Ecology under WAC Chapter 173-539A requires any new withdrawals of groundwater to be mitigated, this Court's determination that permit-exempt withdrawals for stock watering purposes are not limited to a specific quantity will have no impact on Upper Kittitas County because

¹ AP complains that the rule "operates prospectively." AP Brief at 20. For this, of course, there is good reason: a retroactive ban would deprive existing permit-exempt groundwater users of vested rights established under prior law.

Ecology has undertaken regulatory management and control of future withdrawals of groundwater, whether they be new withdrawals or expansion of existing withdrawals.

2.3 AP Fails to Address the Statutory Interpretation Issue Before This Court.

Although AP cites to RCW 90.44.050, AP's section titled "Argument" ignores clear rules of statutory construction set out by this court in *Ecology vs. Campbell & Gwinn*² and related decisions which are cited extensively in the State Defendant's Reply Brief in this matter and the Agricultural Association Interveners' Reply Brief in this matter. AP Brief at 12-14. AP suggests the court simply ignore the plain language of RCW 90.44.050 and, instead, consider "original legislative intent". AP Brief at 13. The only authority cited by AP for the alleged "original legislative intent" of the 1945 state statute are workplace classifications adopted by a federal agency created in 1970. AP Brief at 13, n 9. Instead of argument pertaining to legislative intent, AP offers the Court its subjective view of what the law should be – an argument AP should address to the legislature.

² *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d. 4 (2002); see also *State of Washington's and Department of Ecology's Response Brief*, § B1 and 2 (pgs.10-16) and *Agricultural Association's Response Brief to Opening Brief of Appellants* § 6.2 (pgs. 19-33).

AP's other legislative intent views are misplaced. First, there is no need to consider legislative intent because the plain language of RCW 90.44.050 is the expression of what the legislature intended. Second, there is no evidence of legislative intent in the record. Instead of evidence of legislative intent, the Appellants offered obtuse and obscure studies which bear no relation to the 1945 Groundwater Code.

AP also points to what it refers to as Ecology's "sixty years of statutory interpretation". AP ignores the fact that, in the record in this case, there is conflicting evidence as to Ecology's interpretation of RCW 90.44.050. The Agricultural Association Interveners submitted declarations, which indicate at various times, varying individuals contacted the Department of Ecology and/or other representatives of the state, to determine whether they needed a permit for their groundwater withdrawals. (C.P. 236, 233, 220). At no time were those individuals told that the withdrawal of water for stock watering purposes was limited to 5,000 gallons, let alone any gallon limitation.


AP also argues the interpretation that RCW 90.44.050 withdrawals for stock watering purposes are not limited to a particular quantity undermines the statutory scheme. While AP attempts to argue that the statutory scheme is upset by a determination that stock water withdrawals are not limited to a specific quantity, they ignore the fact that withdrawals

for stock watering purposes become water rights once the water is beneficially used. RCW 90.44.050. The water rights created by permit exempt withdrawals for stock watering purposes are subject to regulation by Ecology, much like Ecology did when it regulated groundwaters in Upper Kittitas County by rule. AP launches into a lengthy discourse discussing "senior" water rights vis-à-vis "junior" water rights in Upper Kittitas County. The discussion provides no assistance to the Court in resolving the question of statutory interpretation present in this case.

III. CONCLUSION

In conclusion of the Brief of *Amicus Curiae* Aqua Permanente is silent on the issues truly before this Court, seeks to introduce new, unsubstantiated, and inaccurate facts, and is nothing more than a policy argument better directed to the legislature.

DATED this 6 day of June, 2011.



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Cattle Producers of Washington,
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Ellensburg, Washington this 6th day of June, 2011.


 Julie Johnson
 Legal Assistant to Jeff Slothower

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